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8 IN THE UNITED STATES DISTRICT COURT  
9 FOR THE WESTERN DISTRICT OF WASHINGTON  
10 SEATTLE DIVISION

11	MICHAEL THOMAS,	)	Case No. 2:15-cv-01309-RSL
12		)	
13	vs.	)	GREEN TREE SERVICING LLC'S
	Plaintiff,	)	SUMMARY JUDGMENT REPLY BRIEF
14	FLAGSTAR BANK, NA and GREEN TREE	)	
15	SERVICING LLC,	)	<b>NOTED FOR: JUNE 9, 2017</b>
16	Defendants.	)	

17 Plaintiff Michael Thomas' ("Plaintiff") Response to Green Tree Servicing LLC  
18 ("Green Tree") Motion for Summary Judgment misses the mark. The issue is not what  
19 encumbrance legally has priority over another encumbrance. The issue is that Plaintiff  
20 did not fulfill the Freddie Mac requirements for modifying his loan and, therefore, was  
21 properly denied a permanent loan modification. Moreover, Plaintiff seeks to avoid  
22 summary judgment by now basing his claims on completely new allegations and claims  
23 for relief not found anywhere in his Complaint. Nonetheless, Plaintiff has failed to put  
24 forth any admissible evidence to substantiate his claims against Green Tree and, as a  
25 result, they must be dismissed.

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**A. Plaintiff's Operative Allegations.**

Plaintiff's Complaint does not mention a title report or tax liens, never mind asserting any allegation regarding any type of "bait and switch" by Green Tree relating to Plaintiff's loan modification application or Green Tree's alleged mishandling of the title reports. Plaintiff's Complaint does not assert any claim for the breach of good faith and fair dealing. Indeed, the sum of Plaintiff's allegations against Green Tree are:

Breach of Contract: "Plaintiff accepted these offers by submitting timely payments in compliance with the terms of the offers. Flagstar and Green Tree subsequently breached the contract when they wrongfully denied Plaintiff for a loan modification after Plaintiff fully complied with the terms of the offers." Complaint, ¶ 21.

CPA: "Green Tree engaged in unfair and deceptive acts and practices in violation of RCW 19.86.020, including but not limited to: a. Making representations to Plaintiffs that they had been offered trial period plans that would be converted to a permanent modification upon completion of the trial period plan; b. After Plaintiff complied with all terms of the offer, Defendants refused to permanently modify Plaintiffs loan; and c. Charging fees associated with Flagstar's and Green Tree's incorrect determination that the Plaintiffs' loans were in default including, but not limited to, late fees, interest capitalization and other fees associated with a default." Complaint, ¶ 23.

Negligent Misrepresentation: "Defendants negligently represented to Plaintiff that upon completion of their trial period plan, he would be offered a permanent loan modification. Flagstar and Green Tree representation were negligent as they subsequently refused to honor its offer of a modification, by refusing to permanently modify Plaintiff's loan after Plaintiff complied with all terms of the trial period plans offered to him." Complaint, ¶ 30.

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1 If Plaintiff was going to base his claims on alleged false and misleading  
2 representations regarding or relating to the title reports or Green Tree's handling thereof,  
3 one would surmise that these claims would make the list of "unfair and deceptive  
4 practices" in paragraph 23 of the Complaint. This was not "new" information that Plaintiff  
5 discovered via the litigation, and even if it was, Plaintiff had more than ample opportunity  
6 to amend his Complaint to add these claims.

7 On or about April 21, 2014, Plaintiff submitted a loan modification application to  
8 Green Tree. Supplemental Declaration of William G. Fig, Exhibit 1, Deposition of Thomas  
9 p. 74:10-22, Ex. 11. Plaintiff had many liens (or potential liens) against his property. *Id.*  
10 at 56:17-24, Ex. 7; 64:22-25-65:1-5, Ex. 9. Plaintiff knew he had to address these liens  
11 in order for a loan modification to be approved. *Id.*; Response Brief, p. 18:6-10. Green  
12 Tree informed Plaintiff of the potential title issues and twice sent Plaintiff additional  
13 documents to assist Green Tree in verifying the liens. Supplemental Declaration of  
14 William G. Fig, Exhibit 1, Deposition of Thomas, at 90:8-21, Ex. 19; Declaration of Christy  
15 Christensen, ¶ 12 (DKT 39); Supplemental Declaration of William G. Fig, Exhibit 2,  
16 Deposition of Christy Christensen, 83:7-21, Ex. 7 at GT-00107 and 104. Plaintiff did not  
17 return the required information until January 5, 2015, over two months after it was first  
18 sent to him. *Id.* at GT-00103.

19 Plaintiff clearly knew there were potential issues relating to the title to the Property  
20 before heading into the January 2015 mediation. More importantly, Plaintiff absolutely  
21 knew of the January 2015 title report prior to filing his July 2015 lawsuit (Hamilton Depo.,<sup>1</sup>  
22 17:25-18:8, Ex. 41 at GT-05531) and had more than ample opportunity to amend his  
23 Complaint to include allegations relating to the title reports and Green Tree's alleged  
24 mishandling thereof. Plaintiff failed to do so. Thus, Plaintiff's original Complaint frames  
25 the claims for relief and supporting allegations. Plaintiff cannot change the entire theory

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<sup>1</sup> References to the "Hamilton Depo." are to Dkt. 40-2

1 of his case and his claims after the close of discovery in response to Green Tree's  
2 Summary Judgment Motions. *Worthy v. ITT Tech Inst.*, 2010 U.S. Dist. LEXIS 42776 \*  
3 26- \*27 (WD WA April 30, 2010).

4 Plaintiff's claims, as plead in his operative Complaint against Green Tree, must be  
5 dismissed.

6 **B. Plaintiff's Breach of Contract Claim.**

7 Plaintiff does not argue that he met all of the applicable Freddie Mac qualification  
8 requirements in order to have his loan permanently modified. Instead, Plaintiff  
9 incredulously argues that he did not know of the tax liens recorded against his own  
10 property and, without citing any authority, that Green Tree, not Plaintiff, should have done  
11 something to address the liens. Plaintiff then argues, without providing any proof as to  
12 the type of liens at issue, that the loan modification should have been granted because  
13 the liens were subordinate to any modification agreement. Plaintiff cites no Washington  
14 authority that a loan modification agreement related back to the original Deed of Trust or  
15 that Washington follows the Restatement (Third) of Prop.: Mortgages.

16 As set forth in § A (p. 3, Ins. 7-16) above, Green Tree did not breach any  
17 contractual duty it owed to plaintiff. Plaintiff was aware of the title issues related to his  
18 Property and knew the multiple liens against the Property needed to be addressed in  
19 order to obtain a loan modification. Green Tree worked with Plaintiff to address the lien  
20 issues. Supplemental Declaration of William G. Fig, Exhibit 2, Deposition of Christy  
21 Christensen, 83:7-21, Ex. 7. However, when Plaintiff erroneously denied the remaining  
22 liens were his and refused to address them, Green Tree properly denied the pending loan  
23 modification.

24 **Whether the tax liens are subordinate to a loan modification agreement is**  
25 **irrelevant.** Green Tree put forth admissible evidence that it must be able to obtain title  
26 insurance to ensure that the resulting modified mortgage lien retains a first lien priority

1 position. Hamilton Depo., 26:6-23; 27:21-25; 28:1-14 , Ex. 42, p. 1. Under Freddie Mac  
2 Guidelines, § B65.20, 1(b), Green Tree must do more than obtain “clear title”. Green Tree  
3 must:

4 “Obtain a title endorsement or similar title insurance product issued by a title  
5 insurance company to ensure that the modified Mortgage retains first lien  
6 priority, if (1) the amount capitalized is greater than \$50,000 (....  
7 ...” *Id.*

8 The January 2015 title report states on its face that the liens needed to be  
9 addressed for title insurance to issue as Mr. Hamilton testified title insurance would not  
10 issue if the liens were not addressed. Hamilton Depo., 29:1-24, Exhibit 11. As  
11 Mr. Hamilton further testified, because of the amount of Plaintiff’s Loan, Freddie Mac  
12 guidelines prohibited Green Tree from offering a loan modification without title insurance.  
13 Hamilton Depo., 2 22:17-25; 23:1-7; 26:6-23; 27:21-25; 28:1-14, Ex. 42, p. 1. At the last  
14 FFA mediation, Plaintiff was given the opportunity to address the liens, but declined to do  
15 so. Green Tree cannot work with Plaintiff to address liens he denies are his. Without the  
16 ability to obtain title insurance, the modification could not be offered and was denied via  
17 a January 23, 2015 letter.<sup>2</sup> Declaration of Christy Christensen (DKT 39), ¶ 14, Ex. 4 (DKT  
18 39-4).

19 Plaintiff misunderstands *Corvello v. Wells Fargo*, 728 F.3d 878 (9<sup>th</sup> Cir. 2013).  
20 *Corvello* is about the servicer, without any explanation, failing to offer the borrower a  
21 permanent loan modification after the borrower made the TPP payments. Here, that is  
22 not the case. While Green Tree may have known of title issues in October 2014, Plaintiff  
23 was aware of them as well. It was Plaintiff’s decision to apply for a loan modification and  
24 there was nothing preventing him from “clearing up” title to his Property during the TPP  
25 period. Indeed, here, that is exactly what Plaintiff, at least partially, attempted to do.

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<sup>2</sup> See also, Motion for Summary Judgment, p. 8, for evidentiary support.

1 Plaintiff's Complaint does not allege any willful or wanton conduct by Green Tree  
2 to support emotional distress damages.<sup>3</sup> This court has consistently held that emotional  
3 distress damages are not recoverable in the foreclosure/loan servicer context. See, e.g.,  
4 *Henderson v. GMAC Mortg. Corp.*, No. C05-5781RBL, 2008 U.S. Dist. LEXIS 29329, at  
5 \*14 (W.D. Wash. Apr. 10, 2008) (emotional distress damages not permitted for claim  
6 arising out of breach of contract where the plaintiffs failed to show that the defendants  
7 acted negligently outside of the alleged breach); accord, *Algaier v. CMG Mortg., Inc.*,  
8 No. 13-CV-0380-TOR, 2014 U.S. Dist. LEXIS 112363, at \*10 (E.D. Wash. Aug. 13, 2014).

9 **C. Plaintiff's CPA Claim.**

10 As stated above, Plaintiff's CPA claim alleges nothing about title reports, the  
11 alleged mishandling thereof, or Green Tree's purported duty to investigate loan file when  
12 a borrower applies for a loan modification. Nonetheless, Plaintiff now seems to hinge his  
13 CPA claim on Green Tree's handling of three such reports. As set forth in § A (p. 3, Ins.  
14 7-16) above, and in its Motions for Summary Judgment, Green Tree's actions were not  
15 unfair or deceptive. Indeed, the evidence shows that Green Tree attempted to assist  
16 Plaintiff in obtaining his loan modification. See Supplemental Declaration of William G.  
17 Fig, Exhibit 2, Deposition of Christy Christensen, 83:7-21, Ex. 7. Plaintiff has put forth no  
18 admissible evidence of any allegedly unfair and deceptive acts by Green Tree.

19 Plaintiff has not put forth admissible evidence proving that Green Tree was the *but*  
20 *for* cause of his alleged harm. Green Tree did not cause Plaintiff to default on the Loan;  
21 Plaintiff admits he was delinquent in his payments. Thomas Depo. (Dkt. 40-1), 72:1-3.  
22 Green Tree did not cause the various liens to be recorded against the Property, which  
23 clouded title to the Property. It was Plaintiff's denial of the liens at the FFA mediation and  
24 his refusal to address them that were the *but for* cause of his alleged damages. Plaintiff  
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26 <sup>3</sup> Green Tree does not admit Plaintiff suffered any emotional distress; however, that is a  
question of fact not appropriate for summary judgment.

1 has put forth no evidence or authority that Green Tree had a duty to address Plaintiff's  
2 tax liens.

3 Likewise, in a failed effort to meet the public interest element of his CPA claim,  
4 Plaintiff makes unsupported assertions regarding Green Tree's alleged conduct. See  
5 Response Brief, p. 20., Ins. 15-22. These assertions are not admissible evidence and  
6 are wholly insufficient to support this necessary element of Plaintiff's CPA claim. To the  
7 extent Plaintiff seeks emotional distress damages under his CPA claim, such damages  
8 are not recoverable. *Demopolis v. Galvin*, 57 Wn. App. 47, 55 (1990); *Panag v. Farmers*  
9 *Ins. Co. of Wash.*, 166 Wn.2d 27, 57-60 (2009).

10 Summary judgment should be granted in Green Tree's favor on Plaintiff's CPA  
11 claim.

12 **D. Plaintiff's Negligent Misrepresentation Claim.**

13 Plaintiff's negligent misrepresentation claim against Green Tree is based on the  
14 August 6, 2014 letter. Complaint, ¶¶ 30-33. In other words, it is identical to his breach of  
15 contract claim. As set forth in § A (p. 3, Ins. 7-16) above, and in its Motions for Summary  
16 Judgment, Green Tree did not make any misrepresentations to Plaintiff. Plaintiff has not  
17 come close to meeting the significant burden of proving by "clear, cogent, and convincing  
18 evidence" that the August 6 letter (or that Green Tree) misrepresented anything to  
19 Plaintiff. *Djibra v. Quality Loan Service Corp. of Wash., Inc.*, No. 47595-2-II, 2016 Wash.  
20 App. LEXIS 2585 (Court of Appeals, Division Two, October 25, 2016)(unpublished  
21 opinion).

22 Washington courts have clearly held that a lender/servicer's duty to a borrower, if  
23 any, is based in contract and, therefore, no negligence claim exists against the  
24 lender/servicer. *Brown v. Countrywide Home Loans*, 2016 U.S. Dist. LEXIS 56200 (E.D.  
25 WA Apr. 27, 2016) (negligence claim against Bank of America barred); *Johnson v. JP*  
26 *Morgan Chase Bank, NA*, 2015 US Dist. LEXIS 105472 at \*23-\*24 (WD WA Aug. 11,

1 2015)( Home Owners' Loan Act, 12 USC §1461-1440 bars claims for negligent process  
2 of loan modification).

3 Faced with this authority, Plaintiff resorts to non-binding California cases to support  
4 his negligent misrepresentation claim. *Ansanelli* involves a motion to dismiss and,  
5 therefore, is not applicable here. *Martinez* supports Green Tree's position. *Jolley*  
6 involved a construction loan and is based on California common law. This court should  
7 decline Plaintiff's invitation to adopt California law.

8 **E. Response to Motion to Strike and Motion to Strike Exhibits to DeGraaff.**

9 Without conceding the validity of Plaintiff's argument, Green Tree does not oppose  
10 striking the following sentence from the Declaration of Christy Christensen: "The title  
11 company was requiring the tax lien encumbrances to be removed before title insurance  
12 on a permanent modification agreement could issue." This same information is  
13 thoroughly addressed in Mr. Hamilton's deposition testimony.

14 In support of his Summary Judgment Response Brief, Plaintiff submits the  
15 Declaration of Jacob DeGraaff with multiple attached Exhibits. Exhibits 3 and 5 through  
16 7 are inadmissible because they are not authenticated under FRE 901 and are hearsay  
17 under FRE 801 and 802. Plaintiff did not establish the business records exception under  
18 FRE 803(6) regarding these exhibits, nor did he submit any admission from a Green Tree  
19 witness that these documents were business records.<sup>4</sup> The fact that the exhibits were  
20 used as exhibits at a deposition does not automatically make them admissible into  
21 evidence. FRCP 56 requires admissible evidence to support or refute a motion for  
22 summary judgment. As a result, Exhibits 3 and 5 through 7 should be struck from the  
23 court record, or not considered by the Court as evidence in opposition to Green Tree's  
24 motion.

25 \_\_\_\_\_  
26 <sup>4</sup> Plaintiff did submit sufficient deposition testimony of Mrs. Christensen to show Exhibit 4  
was a business record.



1 **CONCLUSION**

2 Based on the foregoing, Defendant Green Tree respectfully requests the Court  
3 grant its Motions for Summary Judgment and dismiss Plaintiff's Complaint with prejudice.

4 Dated: June 9, 2017.

5 SUSSMAN SHANK LLP

6  
7 By /s/ William G. Fig  
8 William G. Fig, WSBA 33943  
9 wfig@sussmanshank.com  
10 Attorneys for Green Tree Servicing LLC  
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1 CERTIFICATE OF SERVICE

2 THE UNDERSIGNED certifies:

3 1. My name is Karen D. Muir. I am a citizen of Washington County, state of  
4 Oregon, over the age of eighteen (18) years and not a party to this action.

5 2. On June 9, 2017, I caused to be delivered **electronically, via the court's**  
6 **ecf system**, a copy of: **GREEN TREE SERVICING LLC'S SUMMARY JUDGMENT**  
7 **REPLY BRIEF**, to the interested parties of record, addressed as follows:

8 Christina Latta Henry [chenry@HDM-legal.com](mailto:chenry@HDM-legal.com), [hdmecl@gmail.com](mailto:hdmecl@gmail.com),  
9 [mainline@hdm-legal.com](mailto:mainline@hdm-legal.com)

10 Jacob Daniel DeGraaff [mainline@hdm-legal.com](mailto:mainline@hdm-legal.com), [hdmecl@gmail.com](mailto:hdmecl@gmail.com)

11 I SWEAR UNDER PENALTY OF PERJURY that the foregoing is true and correct  
12 to the best of my knowledge, information, and belief.

13 /s/ Karen D. Muir

14 Karen D. Muir, Legal Assistant

15 \*22428-086\MOTION FOR SUMMARY JUDGMENT (02346410);3  
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